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No. 85-3

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

ATLANTA GAS LIGHT COMPANY,
Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

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QUESTION PRESENTED

Should this Court's ruling in *Newport News Shipbuilding & Dry Dock Co. v. EEOC* be applied retroactively?

INTERESTED PARTIES

The following listed parties have an interest in the outcome of this case:

Atlanta Gas Light Company (Petitioner)

Equal Employment Opportunity Commission (Respondent)

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ATLANTA GAS LIGHT COMPANY,
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v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

Petitioner, Atlanta Gas Light Company (hereafter the "Company"), prays that this Court issue a writ of certiorari to review the judgment of the Eleventh Circuit Court of Appeals entered in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 751 F.2d 1188 (11th Cir. 1985), and is reproduced as Appendix A. The December 15, 1983 opinion and order of the district court is unofficially reported at 36 Fair Empl. Prac. Cas. (BNA) 1669 (N.D.Ga. 1983), and is reproduced as Appendix B.

The district court's order of August 17, 1982, granting summary judgment in favor of the Company is reproduced as Appendix C.

JURISDICTION

Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1). The court of appeals for the Eleventh Circuit entered judgment on January 28, 1985 (Appendix A), and denied a petition for rehearing on June 3, 1985 (Appendix D). This petition was thereafter filed within the appropriate time limits.

STATUTORY PROVISIONS INVOLVED

Section 701(k) of Title VII:

> The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise. This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion: *Provided*, That nothing herein shall preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion.

42 U.S.C. § 2000e-(k).

Section 703(a) of Title VII:

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a).

Section 704 of Title VII:

(a) It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

(b) It shall be an unlawful employment practice for an employer, labor organization, employment agency, or joint labor-managment

> committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to print or publish or cause to be printed or published any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such a labor organization, or relating to the classification or referral for employment by such an employment agency, or relating to admission to, or employment in, any program established to provide apprenticeship or other training by such a joint labor-management committee, indicating any preference, limitation, specification, or discrimination, based on race, color, religion, sex, or national origin, except that such a notice or advertisement may indicate a preference, limitation, specification, or discrimination based on religion, sex, or national origin when religion, sex, or national origin is a bona fide occupational qualification for employment.

42 U.S.C. § 2000e-3.

Subsection 10(b) of the EEOC's Guidelines on Discrimination Because of Sex:

> Disabilities caused or contributed to by pregnancy, childbirth, or related medical conditions, for all job-related purposes, shall be treated the same as disabilities caused or contributed to by other medical conditions, under any health or disability insurance or sick leave plan available in connection with employment. Written or unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, the accrual of seniority

and other benefits and privileges, reinstatement, and payment under any health or disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy, childbirth, or related medical conditions on the same terms and conditions as they are applied to other disabilities. Health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term or where medical complications have arisen from an abortion, are not required to be paid by an employer; nothing herein, however, precludes an employer from providing abortion benefits or otherwise affects bargaining agreements in regard to abortion.

44 *Fed. Reg.* 23,805 (April 20, 1979), *reprinted in* 29 C.F.R. § 1604.10(b) (1981).

Questions and Answers Nos. 21 and 22:

21. Q. Must an employer provide health insurance coverage for the medical expenses of pregnancy-related conditions of the spouses of male employees? Of all the dependents of all employees?

A. Where an employer provides no coverage for dependents, the employer is not required to institute such coverage. However, if an employer's insurance program covers the medical expenses of spouses of female employees, then it must equally cover the medical expenses of spouses of male employees, including those arising from pregnancy-related conditions.

But the insurance does not have to cover the pregnancy-related conditions of non-spouse de-

pendents as long as it excludes the pregnancy-related conditions of such non-spouse dependents of male and female employees equally.

22. Q. Must an employer provide the same level of health insurance coverage for the pregnancy-related medical conditions of the spouses of male employees as it provides for its female employees?

A. No. It is not necessary to provide the same level of coverage for the pregnancy-related medical conditions of spouses of male employees as FOR FEMALE EMPLOYEES. However, where the employer provides coverage for the medical conditions of the spouses of its employees, then the level of coverage for pregnancy-related medical conditions of the spouses of male employees must be the same as the level of coverage for all other medical conditions of the spouses of female employees. For example, if the employer covers employees for 100 percent of reasonable and customary expenses sustained for a medical condition, but only covers dependent spouses for 50 percent of reasonable and customary expenses for their medical conditions, the pregnancy-related expenses of the male employee's spouse must be covered at the 50 percent level.

44 *Fed. Reg.* 23,807-08 (April 20, 1979), *reprinted in* 29 C.F.R. Part 1604 (Appendix) (1981).

STATEMENT OF THE CASE

Petitioner, Atlanta Gas Light Company, provides hospitalization and medical insurance coverage to its employees. The Company also provides elective coverage under the Group Plan for Dependents of Employ-

ees. Employees opting for insurance coverage for dependents pay a portion of its cost. Since April 19, 1979, the effective date of the Pregnancy Discrimination Act of 1978, 42 U.S.C. §§ 2000e(k) and 2000e-2(a) (hereafter the "PDA"), the company has provided its female employees with full insurance coverage at no cost to the employee for pregnancy-related conditions.

Prior to this Court's decision in *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669 (1983), the company's male employees choosing dependent coverage also had the option of purchasing a supplemental pregnancy policy for their wives. On June 20, 1983 (the date of the decision in *Newport News*), the insurance plan was modified to provide full coverage under the dependent policy for the pregnancy-related conditions of the spouses of male employees.

Three months after the district court in *Newport News* issued its decision in favor of the defendant, the Equal Employment Opportunity Commission (hereafter the "EEOC") filed this action against Atlanta Gas Light Company in the United States District Court for the Northern District of Georgia, claiming that the employer's failure to provide pregnancy-related coverage to male employees for their spouses' pregnancy-related expenses on the same basis as coverage was provided for other conditions violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17. On August 17, 1982, the district court granted summary judgment in favor of Atlanta Gas Light Company (Appendix C). The EEOC appealed that ruling to the United States Court of Appeals for the Eleventh Circuit, and obtained a stay of all appellate proceedings pending this Court's decision in *Newport News*.

In light of the ruling in *Newport News* that denial of pregnancy benefits to dependents of male employees

violates the PDA, the Eleventh Circuit summarily reversed the district court and remanded the case. The district court then reversed its order entered August 17, 1982, and granted the EEOC's motion for partial summary judgment on September 2, 1983. On December 14, 1983, the district court entered an order requiring the company to take the following actions:

> 1. Within a reasonable time after the entry of this Order, reimburse every male employee and every former male employee for all insurance premiums paid for the supplemental pregnancy coverage under [the Company's] health insurance plan between April 29, 1979, and June 20, 1983, plus interest of twelve percent per annum.
>
> 2. Within a reasonable time after the entry of this Order, reimburse every male employee and every former male employee who elected dependent coverage under [the Company's] health insurance plan for the medical and hospital costs for the pregnancy of his wife and resulting childbirth which have not heretofore been reimbursed under [the Company's] health insurance plan, plus interest of twelve percent per annum.

(Appendix B, p. B4-B5). The order also prescribed certain procedures for the Company to follow in notifying and reimbursing its male employees, and it further "enjoined and restrained" the Company "from making any additional charge for or placing any special dollar limitation on the pregnancy coverage for the spouses of male employees who have elected dependent coverage under [the Company's] group health insurance plan." (Appendix B, p. B6).

The Company appealed from those provisions of the district court's order which require the Company to reimburse its male employees for premiums paid and/or

expenses incurred before the date of the *Newport News* decision. The court of appeals affirmed the district court and ruled that the holding in *Newport News* should be applied retroactively.

REASONS FOR GRANTING A WRIT

1. The Court Below Incorrectly Decided an Important Issue of Federal Law Which Has Not Been, But Should Be, Settled by This Court.

For the past decade the law regarding pregnancy benefits offered by employers has been the source of much confusion. In *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), this Court ruled that denial of pregnancy benefits to female employees under employer-provided health insurance plans did not violate Title VII. In 1978, Congress enacted the PDA to amend Title VII and legislatively overrule *Gilbert*. The PDA provided in relevant part:

> [W]omen affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work. . . .

42 U.S.C. § 2000e-(k).

While this legislation settled the issue of whether female employees were entitled to pregnancy benefits, it did not clearly define whether an employer had a duty to make pregnancy benefits available for the spouses of male employees when it provides health or medical insurance for dependents. Four years after the effective date of the PDA, after inconsistent holdings in the lower courts, this Court ruled on that issue in *Newport News*. However, the matter is still not at rest.

The issue of monetary relief was not presented in *Newport News*. The district court dismissed the complaint ruling that the PDA did not require provision of pregnancy benefits to spouses. When the Fourth Circuit reversed that ruling, the employer petitioned this Court for review. Although employers now have the long-awaited pronouncements from the highest levels of government on their present duties, the lingering issue of how to treat the four years of confusion calls for this Court's guidance.

2. The Decision of the Court Below Is Inconsistent with Decisions of This Court.

The late Justice Frankfurter wrote: "We should not indulge in the fiction that the law now announced has always been the law...." *Griffin v. Illinois*, 351 U.S. 12, 26 (1956), *quoted with approval in Chevron Oil Co. v. Huson*, 404 U.S. 97, 107 (1971). Where parties have reasonably relied on existing law, this court has not hesitated to apply a newly announced principle only prospectively. The *Huson* Court adopted a three-part test for determining whether a newly announced principle of law will be applied retroactively:

> First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed . . . . Second, it has been stressed that "[a court] must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." . . . Finally . . . the inequity imposed by retroactive application [must be weighed] . . . .

404 U.S. at 106-07 (citations omitted). This Court has recently reaffirmed that *Huson* factors should govern retroactivity determinations in civil cases. *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 87-88 (1982); *United States v. Johnson*, 457 U.S. 537, 563 (1982).

The court below erred in its application of *Huson*. With regard to the first factor, it read the majority opinion's statement in *Newport News* that the PDA was clear in its wholesale rejection of *Gilbert* to mean it was precluded from finding that *Newport News* was not "clearly foreshadowed." 751 F.2d at 1190 (Appendix A at A7). This reading ignores the policies behind *Huson*. *Gilbert* addressed only insurance benefits to employees and did not reach the issue of dependent coverage decided in *Newport News*. After the dissenting view in *Gilbert* was adopted by Congress and prior to *Newport News*, many lower courts still did not find fault in the exclusion of pregnancy benefits under dependent coverage. A view from petitioner's perspective of the period from April 19, 1979 to June 20, 1983 illustrates that *Newport News* was not "clearly foreshadowed."

Atlanta Gas Light Company amended its insurance program to cover pregnancy-related expenses of female employees on April 19, 1979, the effective date of the PDA. The Company did not amend its dependent coverage. One year and ten months later the first challenge to a similar insurance program was struck down by a federal district court in Virginia. *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 510 F. Supp. 66 (E.D.Va. 1981). At this point, the Gas Company was unquestionably reasonable in assuming that its own plan was lawful. By the end of 1981 two other district courts had reached the same conclusion. *EEOC v. Lockheed Missiles & Space Co.*, 27 Fair Empl. Prac.

Cas. (BNA) 1209 (N.D. Cal. 1981); *EEOC v. Joslyn Mfg. Co.*, 524 F. Supp. 1141 (N.D. Ill. 1981). No doubt all employers with similar plans were justified in maintaining the status quo.

The first hint that the federal judiciary might disapprove of not including pregnancy expenses in employer-provided dependent insurance coverage did not come until January 7, 1982, when the Fourth Circuit rendered its opinion in *Newport News. Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 667 F.2d 44 (4th Cir. 1982). However, three months later the United States District Court for the Eastern District of Missouri disagreed with the Fourth Circuit and followed the earlier trend. *EEOC v. Emerson Electric Co.*, 539 F. Supp. 153 (E.D. Mo. 1982).

The only district court to strike down a similar plan was the Central District of California in *United Teachers-Los Angeles v. Bd. of Educ.*, 31 Fair Empl. Prac. Cas. (BNA) 943 (C.D. Cal. 1982), but that case was overruled *sub silentio* in July of 1982 by the Ninth Circuit in *EEOC v. Lockheed Missiles & Space Co.*, 680 F.2d 1243 (9th Cir. 1982).

In August of 1982 the legality of the petitioner's insurance plan under existing law would have seemed almost certain. The Northern District of Texas upheld a similar plan. *EEOC v. A.R.A. Mfg. Co.*, No. Ca. 3-81-0406-F (N.D. Tex. Aug. 18, 1982). Most importantly, though, the Court for the Northern District of Georgia granted summary judgment against the EEOC in a challenge to the Company's insurance program. Order of August 18, 1982 (Appendix C). No reasonable person in the Company's position would have concluded that it was under a legal obligation to amend the plan.

The Company's reliance was even further supported just one month before this Court's decision in *New-*

port News when the Seventh Circuit was unable to accurately predict the ruling. *EEOC v. Joslyn Mfg. & Supply Co.*, 706 F.2d 1469 (7th Cir. 1983).

If, as the court below states, the *Newport News* holding was "clearly foreshadowed," the clarity somehow escaped the overwhelming majority of the federal judges who considered the question, including two members of this Court. The language and the legislative history of the PDA are silent on the question of pregnancy benefits for dependents. Indeed, Counsel for the EEOC conceded at oral argument in *Newport News* that Congress was not clear on the issue. Transcript of Oral Argument at 25-28, *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669 (1983).

What the *Newport News* decision said was clear was that Congress intended to wipe the jurisprudential slate of both the holding *and the reasoning* of *Gilbert*.[1] Therefore, the judiciary was faced with the difficult task of rendering judgments as if *Gilbert* never existed. However, only this Court had the ability to know the full extent to which the absence of *Gilbert* and its underlying reasoning affected Title VII law. The only way the lower courts and employers could have known the answer was through clairvoyance.

That the EEOC incorporated its argument into its interpretative guidelines does not mean that *Newport News* did nothing more than restate a long-recognized rule of law. On April 20, 1979, the EEOC did publish

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[1] There was some disagreement on the Court as to whether the PDA left any part of the *Gilbert* case intact. *See* 462 U.S. at 687 (Rehnquist, J. Dissenting). The holdings in the lower courts no doubt reflected this point of view. Laboring under this presupposition, it is no wonder that the lower courts were unable to predict *Newport News*.

in the Federal Register a set of guidelines which indicated that it would read the PDA to require an employer to include pregnancy-related conditions in the dependent coverage under its health insurance plan. 44 Fed. Reg. 23,804-08 (1979)(codified as an appendix to 29 C.F.R. Part 1604). However, this Court has made it abundantly clear that a court should give little weight to these types of guidelines from the EEOC. In *General Electric Co. v. Gilbert,* 429 U.S. 125, 141 (1976), the Court pointed out that the EEOC has no authority under Title VII to promulgate rules and regulations with the force of law. In *Los Angeles Department of Water & Power v. Manhart,* 435 U.S. 702, 719 n.36 (1978), the Court stated that the district court had erred in giving conclusive weight to an EEOC guideline in its decision on retroactivity. At most, the EEOC's guidelines muddied the legal waters a little more, but they are entitled to less respect than court decisions specifically rejecting their interpretation. *See, e.g., EEOC v. Joslyn Manufacturing & Supply Co.,* 706 F.2d at 1480-81; *EEOC v. Emerson Electric Co.,* 539 F. Supp. at 159.

The court below also erred in its application of the second and third *Huson* factors. The decision merges the analysis of these factors and it is difficult to ascertain the court's precise reasoning. *See* 751 F.2d at 1191 (Appendix A, A7-A8). However, it apparently found that the second *Huson* factor—whether retroactivity will further or retard the underlying purpose of the rule in question—required retroactivity based on statements in *Albermarle Paper Co. v. Moody,* 422 U.S. 405, 417-18 (1975), that employers should be encouraged to engage in "self-evaluation" and "shun practices of dubious legality."

The primary purpose of Title VII was to "achieve equality of employment opportunities and remove bar-

riers" that favor certain groups of employees over others. *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1970). The purpose of the PDA was to "prohibit sex discrimination on the basis of pregnancy." *Newport News*, 462 U.S. at 670. The proper inquiry thus becomes: To what extent will retroactive application of the new principle established by *Newport News* further or retard the elimination of employment discrimination based on pregnancy? The court below properly considered the benefit of self-evaluation, but what would the result of self-evaluation have been in this case? As has been shown in the previous section, self-evaluation beginning on April 19, 1979, and continuing until this Court's ruling in *Newport News*, would have supported the Company's position. It can hardly be said that reliance on the great weight of current jurisprudence is engaging in "practices of dubious legality."

Thus, in this case the underlying purpose of the rule in question would be neither furthered nor hindered. The Supreme Court has now clearly defined an employer's obligation to provide pregnancy coverage for the spouses of male employees, and no further action is necessary to ensure that employers fulfill their obligations after June 20, 1983. As stated in *Manhart*, 435 U.S. 702, 720-21 (1978), "There is no reason to believe that the threat of a backpay award is needed to cause other administrators to amend their practices to conform to this decision."

The third *Huson* factor requires courts to weigh the equities of retroactive application. "Where a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity." *Huson*, 404 U.S. at 107. Two similar cases from this Court illustrate the inequities present in this case. In both *Los Angeles Depart-*

ment of Water & Power v. Manhart, 435 U.S. 702 (1978), and *Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans v. Norris*, 463 U.S. 1073 (1983), the Court refused to give retroactive effect to its finding that an employer had committed a Title VII violation.

In *Manhart*, the Court found illegal an employer-run pension plan which required that female employees make greater monthly contributions than male employees in order to receive benefits equal to those received by male employees. Despite this holding, the Court vacated the order of the district court that the employer should reimburse the female employees for their excess contributions. The Court gave its holding only prospective application because conscientious fund administrators may have assumed that such a plan was lawful. 435 U.S. at 720.

This Court followed the reasoning of the *Manhart* holding in *Norris*, decided just two weeks after *Newport News Shipbuilding & Dry Dock Co. v. EEOC*. In *Norris*, the Court held illegal an employer-operated pension plan that required equal contributions from male and female workers but paid lower benefits to females than to similarly situated males. However, in Part III of Justice Powell's opinion, joined in by four other Justices, the Court also held that it would be "both unprecedented and manifestly unjust" to uphold the district court's order that all future annuity payments for female employees should be made equal to those for similarly situated male employees. 103 S.Ct. at 3509. The Court instead allowed the plan to continue to pay the existing benefits derived from the contributions made prior to the Court's decision. The Court found that here too the employer could reasonably have thought its pension plan lawful and that retroactive application of the holding could have a devas-

tating impact on plan reserves. *Id.* at 3510. It so ruled even though seven of the eight lower courts considering the issue had anticipated *Norris*.[2]

There are many similarities between this case and *Manhart* and *Norris*. Like the employers in *Manhart* and in *Norris*, the Company would face a substantial new liability payable immediately under the ruling of the courts below. The pension fund contributions in those cases are similar to the Company's insurance premiums, since both are based on risk allocation. The insurance premiums are determined by taking into account the amount the insurer will likely have to disburse. The addition of pregnancy expenses necessarily raises the cost of the premium. The *Manhart* court noted the inequity of retroactivity where this type of risk allocation is involved. The district court in *Manhart* had ordered the defendant to refund to female employees the difference between their contributions and those made by male employees. This court reversed, stating:

> This may give the victims of the discrimination more than their due. If an undifferentiated actuarial table had been employed in 1972, women employees would no doubt have been lower than they were, but they would not have been as low as the contributions actually made by men in that period. The District Court should at least have considered ordering a refund of only the difference between contributions they would have made under an actuarially sound and nondiscriminatory plan.

435 U.S. at 719 n.36. The same problem exists here. If the Company's dependent insurance had provided pregnancy benefits all along, it certainly would have

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[2] For a listing of these cases *see Norris*, 463 U.S. at ____ n.9.

been within its rights to raise the amount of the contributions of *all* employees opting for dependent coverage. Thus, by ordering the Company to refund the costs incurred by male employees, the Company is forced to shoulder an expense that could have been borne by the ultimate beneficiaries (the employees) through "shared risk." As this Court has twice noted: "Drastic changes in the legal rules governing pension and insurance funds, like other unforeseen events, can [jeopardize the insurer's solvency and, ultimately, the insureds' benefits.] Consequently, the rules that apply to these funds should not be applied retroactively unless the legislature has plainly commanded that result." *Manhart,* 435 U.S. at 721; *Norris,* 463 U.S. at ____ (Powell, J. concurring).

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Eleventh Circuit.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PLAINTIFF-APPELLEE,

v.

ATLANTA GAS LIGHT COMPANY,
DEFENDANT-APPELLANT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 84-8051.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff-Appellee,

versus

ATLANTA GAS LIGHT COMPANY,
Defendant-Appellant.

Jan. 28, 1985.

The Equal Employment Opportunity Commission brought suits challenging employer's requirement that male employees pay an extra premium for pregnancy-related expenses of their wives. The United States District Court for the Northern District of Georgia, G. Ernest Tidwell, J., entered judgment that United States Supreme Court's recent decision in *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 103 S.Ct. 2622, 77 L.Ed.2d 89, should be given retroactive effect. Employer appealed. The Court of Appeals, Vance, Circuit Judge, held that in view of facts that legislative history of Pregnancy Discrimination Act of 1978 rendered self-evident the correct result in Supreme Court's *Newport News* case, in which Supreme Court found that employment discrimination statute prohibits employers from discriminating against male workers by singling out their wives' pregnancy-related expenses for unfavorable health insurance coverage, that retroactive application of *Newport News* would further application of its rule, and that employer's

burden of making victims whole in instant case would not result in inequitable distribution, retroactive relief back to date on which Pregnancy Discrimination Act became effective, rather than to date on which *Newport News* was rendered, was appropriate.

Affirmed.

Courts 100(1)

In view of facts that legislative history of Pregnancy Discrimination Act of 1978 rendered self-evident the correct result in Supreme Court's *Newport News* case, in which Supreme Court found that employment discrimination statute prohibits employers from discriminating against male workers by singling out their wives' pregnancy-related expenses for unfavorable health insurance coverage, that retroactive application of *Newport News* would further application of its rule, and that employer's burden of making victims whole in instant case would not result in inequitable distribution, retroactive relief back to date on which Pregnancy Discrimination Act became effective, rather than to date on which *Newport News* was rendered, was appropriate. Civil Rights Act of 1964, §§ 701 et seq., 701(k), as amended, 42 U.S.C.A. §§ 2000e et seq., 2000e(k).

J. Lewis Sapp, Thomas A. Pogue, Atlanta, Ga., for defendant-appellant.

Justine Lisser, EEOC, Washington, D.C., for plaintiff-appellee.

Appeal from the United States District Court for the Northern District of Georgia.

Before VANCE and ANDERSON, Circuit Judges, and PITTMAN*, District Judge.

VANCE, Circuit Judge:

Atlanta Gas Light Company appeals the district court's holding that the Supreme Court's recent decision in *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 103 S.Ct. 2622, 77 L.Ed.2d 89 (1983), should be given retroactive effect. We affirm.

From 1976 to 1983, Atlanta Gas Light Company provided a group hospitalization plan to its employees which afforded female employees full insurance coverage for pregnancy-related conditions, but which required male employees to pay an extra premium for the pregnancy-related expenses of their wives. The EEOC brought suits challenging this and similar programs under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to e-17, as amended by the Pregnancy Discrimination Act of 1978 (PDA), 42 U.S.C. 2000e(k).[1] The district court found for Atlanta Gas Light on summary judgment, and the EEOC appealed. While the appeal was pending before this court, the Supreme Court held in *Newport News* that Title VII

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* Honorable Virgil Pittman, U.S. District Judge for the Southern District of Alabama, sitting by designation.

[1] 42 U.S.C. § 2000e(k) reads in relevant part: (k) The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise. . . .

prohibits employers from discriminating against male workers by singling out their wives' pregnancy-related expenses for unfavorable health insurance coverage. Based on *Newport News*, a panel of this court summarily reversed.

On remand, the district court ordered Atlanta Gas Light to compensate those of its male employees who had suffered unfavorable treatment under its pregnancy policy for the losses that they had incurred as of the effective date of the PDA.[2] Atlanta Gas Light now challenges that order, claiming that it should be held liable only as of the date on which *Newport News* was rendered, rather than the date on which the PDA became effective.[3] Both parties agree that the three-part test for nonretroactivity set out in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-07, 92 S.Ct. 349, 355-56, 30 L.Ed.2d 296 (1971) frames our inquiry.

The general rule at common law is to give judicial decisions retroactive effect. In the mid-1960's, the Supreme Court began to expand the exceptions to this basic principle for those criminal procedure cases in

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[2] The court ordered Atlanta Gas Light to do the following; "reimburse every male employee and every former male employee for all insurance premiums paid for the supplemental pregnancy coverage . . . between April 29, 1979, and June 20, 1983, plus interest of twelve percent per annum", and "reimburse every male employee and every former male employee who elected dependent coverage [but not supplemental pregnancy coverage] for the medical and hospital costs for the pregnancy of his wife and resulting childbirth which have not heretofore been reimbursed . . . plus twelve percent per annum. Those expenses which Defendant must reimburse under this Order are limited to expenses incurred between April 29, 1979 and June 20, 1983."

[3] Atlanta Gas Light changed its policy to comport with *Newport News* as of the date on which that decision was announced.

which it was creating new constitutional rules. *See, e.g., Linkletter v. Walker,* 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965); *See United States v. Johnson,* 457 U.S. 537, 542, 102 S.Ct. 2579, 2583, 73 L.Ed.2d 202 (1982). In 1971, the Court further expanded the scope of its nonretroactivity doctrine in *Huson* when it found that retroactive application may also be inappropriate in a narrow range of civil cases according to the following three criteria:

> First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed. Second, it has been stressed that "we must * * * weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." Finally, we have weighed the inequity imposed by retroactive application, for "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity."

Huson, 404 U.S. at 106-07, 92 S.Ct. at 355 (citations omitted). Since then, the Court has found nonretroactivity to be appropriate in two Title VII cases, *Los Angeles Dep't of Water & Power v. Manhart,* 435 U.S. 702, 98 S.Ct. 1370, 55 L.Ed.2d 657 (1978), and *Arizona Governing Committee for Tax Deferred Annuity & Deferred Compensation Plans v. Norris,* 463 U.S. 1073, 103 S.Ct. 3492, 77 L.Ed.2d 1236 (1983). The defendant argues that the Court's application of the *Hu-*

son factors in those cases dictates an identical result here.

We believe, however, that such a conclusion would derive from a misunderstanding of the controlling factors in *Manhart* and *Norris*. As an initial matter, both of those opinions emphasized the continuing validity of *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975), which established a strong presumption of retroactivity in Title VII cases. In *Norris*, the Court reaffirmed that "retroactive relief is normally appropriate in the typical Title VII case", 463 U.S. at ___, 103 S.Ct. at 3510, and in *Manhart* the Court stated that "[t]he *Albemarle* presumption in favor of retroactive liability can seldom be overcome." 435 U.S. at 719, 98 S.Ct. at 1381. In our view, those aspects of *Norris* and *Manhart* which overcame that presumption do not exist in this case.

First, the defendant is unable to show that the issue on which he lost was one "of first impression whose resolution was not clearly foreshadowed." In both *Manhart* and *Norris*, the Court emphasized that its resolution of the issues would have been so difficult to predict that it would be unreasonable to penalize those defendants for not having changed their policies ahead of time. According to the Court's own opinion in *Newport News*, however, the situation is quite different here. The Court noted in that case that Congress' passage of the PDA resulted in large part from its disapproval of the Court's previous decision in *General Elec. Co. v. Gilbert*, 429 U.S. 125, 97 S.Ct. 401, 50 L.Ed.2d 343 (1976). In the Court's words, "Although *Gilbert* concluded that an otherwise inclusive plan that singled out pregnancy-related benefits for exclusion was nondiscriminatory on its face . . . Congress

has unequivocally rejected that reasoning. The 1978 Act makes clear that it is discriminatory to treat pregnancy-related conditions less favorably than other medical conditions." 463 U.S. at ___, 103 S.Ct. at 2631. As this and other passages in the Court's opinion demonstrate, *see id.* 103 S.Ct. at 2631-32, it believed that the legislative history of the PDA rendered the correct result in *Newport News* self-evident.

Atlanta Gas Light argues, however, that the history of both this litigation and the EEOC's challenges to similar plans proves that the outcome was not so clearly foreordained as *Newport News* would suggest. The defendant points out that the district court rendered summary judgment in its favor, and that other courts ruled similarly. *See, e.g., EEOC v. Joslyn Mfg. & Supply Co.,* 706 F.2d 1469, *vacated,* 724 F.2d 52 (7th Cir. 1983); *EEOC v. Lockheed Missiles & Space Co.,* 680 F.2d 1243 (9th Cir. 1982), *vacated,* ___ U.S. ___, 103 S.Ct. 3530, 77 L.Ed.2d 1383 (1983); *EEOC v. Emerson Elec. Co.,* 539 F.Supp. 153 (E.D.Mo.1982). To accept these holdings as dispositive proof that the statute's meaning was unclear would, however, require us to place more weight on the lower courts' statutory analysis than on that of the Supreme Court. This we cannot do. The Supreme Court's role as final arbiter encompasses not only the power to define the meaning of a statute but also the power to announce whether or not that meaning is clear. For us to adhere to the Court's holding but not its reasoning would violate the rules of precedent which control our decision making processes.

The defendant also fails to satisfy the second and third *Huson* criteria. As the Court explained in *Albemarle,* retroactive application has been the historical

rule for Title VII cases because both Congress and the courts have found it to further the statute's goals in two essential ways; by creating incentives for employers to "self-evaluate" and "shun practices of dubious legality" even before they are challenged in litigation, 422 U.S. at 417-18, 95 S.Ct. at 2371-72, and by "mak[ing] persons whole for injuries suffered on account of unlawful employment discrimination," *id.* at 418, 95 S.Ct. at 2372. The Court's decision not to apply its holding retroactively in *Manhart* and *Norris* reflects not its sudden disapproval of the general rule, but rather its recognition of the extraordinary facts of those two cases. Retroactive compensation would have had "devastating results" in both instances, endangering the solvency of the plaintiffs' own pension fund in *Manhart,* and likewise jeopardizing the fiscal soundness of the plaintiffs' insurance program in *Norris.* In contrast, Atlanta Gas Light has not shown that the costs of making its victims whole will lead to such unacceptable results. In addition, we do not perceive that the burden of making the victims whole in this case will be distributed as inequitably as it would have been in *Manhart* and *Norris.* Whereas in those cases the costs of compensating the plaintiffs inevitably would have been shouldered by innocent third parties such as fellow pensioners and unwitting taxpayers—as well as by the plaintiffs themselves in the event of insolvency—here the burden will fall on the entity responsible for the discriminatory policy. For these reasons, we find retroactive relief appropriate.

Finally, the defendant challenges the district court's award of 12 percent interest on the retroactive awards. We find no abuse of discretion in the court's decision to take account of prevailing interest rates in formulating its order; on the contrary, that decision com-

ports well with the *Albemarle* rule that victims of discrimination should be made as whole as possible under Title VII.

AFFIRMED.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PLAINTIFF-APPELLEE,

v.

ATLANTA GAS LIGHT COMPANY,
DEFENDANT-APPELLANT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

APPENDIX B

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF GEORGIA

No. C81-1090A.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff-Appellee,

versus

ATLANTA GAS LIGHT COMPANY,
Defendant-Appellant.

December 15, 1983.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION v. ATLANTA GAS LIGHT COMPANY, No. C81-1090A, December 15, 1983

CIVIL RIGHTS ACT OF 1964

1. Sex — Health benefits — 108.4144

U.S. Supreme Court's decision in Newport News Shipbuilding & Drydock Co. (32 FEP Cases 1) invalidating insurance program excluding pregnancy coverage for female beneficiaries of male employees and providing complete coverage to male beneficiaries of female employees did not establish new principle of law and therefore will be applied retroactively.

2. Interest — 210.451 — 225.681

Prejudgment interest at rate of 12 percent is appropriate to compensate male employees for all insurance premiums paid under employer's unlawful disability insurance program.

Action under Title VII of Civil Rights Act of 1964 by EEOC against employer, wherein EEOC moved for entry of remedial order. Motion granted.

Full Text of Opinion

TIDWELL, District Judge: — The above styled matter is presently before the court on the plaintiff's motion for entry of order which was filed in accordance with this court's order of September 2, 1983. The defendant has objected to the proposed order submitted by the plaintiff on the following grounds: (1) the decision in Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 51 LW 4837, 32 FEP Cases 1 (U.S. June 20, 1983), should not be applied retroactively; (2) the proposed order does not properly define the expenses which the company's employees would be entitled to recover nor does it allow sufficient time for processing and paying the employees' claims; and (3) if the company must reimburse any employees, it should not be ordered to add any interest to such amounts, and in any event, the proper rate for prejudgment interest is seven percent, not twelve percent as proposed by the EEOC.

[1] In order to be applied nonretroactively, a court's decision must, as an initial matter, "establish a new principle of law, either by overruling clear past precedent on which litigants may have relied . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed. . . ." Chevron Oil Co. v. Huson, 404 U.S. 97, 106 (1971) (citations omitted). In Newport News, the Supreme Court indicated that its decision was clearly foreshadowed when Congress amended Title VII in 1978. Referring to its earlier holding in General Electric Co. v. Gilbert, 429 U.S. 125, 13 FEP Cases 1657 (1976), that a company health

insurance plan's exclusion of disabilities caused by pregnancy did not constitute discrimination based on sex, the Court in Newport News stated that Congress had "unambiguously expressed its disapproval of both the holding and the reasoning of the Court in the Gilbert decision" when it had amended Title VII, and the Court concluded by stating that "Congress' rejection of the premises of General Electric v. Gilbert forecloses any claim that an insurance program excluding pregnancy coverage for female beneficiaries and providing complete coverage to similarly situated male beneficiaries does not discriminate on the basis of sex." 51 LW at 4839, 4841. In light of the unequivocal language employed by the Supreme Court, this court concludes that it cannot be said that Newport News established a new principle of law, and therefore this threshold requirement for nonretroactivity has not been met. Accordingly, this court concludes that the decision in Newport News should be applied retroactively.

[2] Concerning the second ground for objection raised by the defendant, it appears that the amended order submitted by the EEOC on November 4, 1983 adequately addresses the concerns expressed therein. Because a primary purpose of the remedial provisions of Title VII is to make whole the victims of unlawful discrimination, and because the amended order submitted by the EEOC provides for reimbursement "within a reasonable time" as requested by the company, the court concludes that prejudgment interest is appropriate in order to fully compensate those employees entitled to reimbursement and to expedite the processing of reimbursement claims. The court also concludes that twelve percent is a proper rate of interest to impose. See Davis v. Construction Materials, A

Division of Ancar Enterprises, Inc., 558 F.Supp. 697, 36 FEP Cases 1779 (N.D. Ala. 1983), and cases cited therein. The court notes that in Washington v. Kroger Co., 671 F.2d 1072, 29 FEP Cases 1739 (8th Cir. 1982), a case cited by the defendant, the appellate court observed that an eight percent prejudgment interest rate in a Title VII case was "hardly compensable in today's market conditions." Id. at 1078. Accordingly, the plaintiff's motion for entry of order is hereby granted and sustained and the court will enter the amended order submitted by the plaintiff on November 4, 1983.

Having granted Plaintiff's motion for partial summary judgment by Order of September 2, 1983, it is hereby ordered that Defendant shall:

1. Within a reasonable time after the entry of this Order, reimburse every male employee and every former male employee for all insurance premiums paid for the supplemental pregnancy coverage under Defendant's health insurance plan between April 29, 1979, and June 20, 1983, plus interest of twelve percent per annum.

2. Within a reasonable time after the entry of this Order, reimburse every male employee and every former male employee who elected dependent coverage under Defendant's health insurance plan for the medical and hospital costs for the pregnancy of his wife and resulting childbirth which have not heretofore been reimbursed under Defendant's health insurance plan, plus interest of twelve percent per annum. Those expenses which Defendant must reimburse under this Order are limited to expenses incurred between April 29, 1979, and June 20, 1983, and are further limited to expenses incurred by each male employee after his election of dependent coverage and before the termi-

nation of his employment. Such reimbursements are to be made in accordance with the provisions in Defendant's health insurance plan on comprehensive major medical benefits in effect at the time the costs were incurred. The applicable provisions shall specifically include any provision regarding the coordination of benefits with any other health insurance paying benefits to the employee or his wife and any provision regarding payment of benefits on acocunt of a preexisting condition. Any exclusion from coverage for pregnancy, childbirth, or resulting complications and any special limitations on the amount of recovery which apply only to pregnancy-related costs shall be striken for the purpose of calculating reimbursement. Defendant shall have no obligation to reimburse any claim received more than sixty (60) days after the date of the letter referred to in paragraph three below.

3. Notify every male employee and former male employee employed by Defendant between April 29, 1979, and June 20, 1983, in writing by sending a certified letter to their last known address stating that this Order has been entered and that they may be entitled to reimbursement for the premiums they paid for pregnancy coverage and for the pregnancy-related expenses they incurred. Attached as Exhibit A is a copy of the letter to be sent to the male employees.

4. Mail to every male employee and former male employee employed by Defendant between April 29, 1979, and June 20, 1983, an insurance claim form along with the letter referred to in paragraph three above.

5. Compute the amount of reimbursement due every male employee and former male employee pursuant to the provisions of paragraphs one and two above.

6. Make available to Plaintiff all insurance claim forms returned to Defendant and any information in support of these claims which are received by Defendant from employees seeking reimbursement pursuant to this Order.

7. Make available to Plaintiff a list of all male employees and former male employees who paid the additional premiums for pregnancy coverage between April 29, 1979, and June 20, 1983, and the total premiums paid.

8. Provide Plaintiff with an accounting of all funds dispersed to current and former male employees pursuant to this Order. The accounting will reflect each employee's name and address, the amount of the claim or claims for reimbursement, and the amount of reimbursement for past premiums paid for pregnancy insurance.

9. Post in a conspicuous place at all of its separate facilities a copy of this Order and Exhibit A attached hereto.

10. Pay the costs of this action.

It is further ORDERED, ADJUDGED, and DECREED that Defendant is hereby enjoined and restrained from making any additional charge for or placing any special dollar limitation on the pregnancy coverage for the spouses of male employees who have elected dependent coverage under Defendant's group health insurance plan.

EXHIBIT A

Dear Sir:

By Order of the Honorable G. Ernest Tidwell, Judge, United States District Court for the Northern District of Georgia, Atlanta Gas Light Company's policy of refusing to pay for the hospital and medical costs of the pregnancy of the wives of male employees with dependency coverage has been ruled in violation of Title VII of the Civil Rights Act of 1964. The Court has also ruled that Atlanta Gas Light's Charging of a $7 per month premium for pregnancy coverage is a violation of Title VII. The Court has ordered that all male employees and former male employees be reimbursed for all hospital and medical costs related to the pregnancy of their wives since April 29, 1979. The Court has also ordered that all male employees and former male employees who paid the extra $7 per month premium for pregnancy coverage be reimbursed for the premium paid as well as any pregnancy costs not, heretofore, reimbursed. Reimbursement will be made in accordance with the Comprehensive Major Medical Benefits Provisions of the health insurance plan in effect at the time the pregnancy costs were incurred, except to the extent explained in the court's Order.

If you elected dependants coverage under the health insurance plan and incurred any hospital or medical costs for the pregnancy of your wife and since April 29, 1979 you should complete the attached claim form just as you would for any other medical or hospital claim. You must complete the claim form and return it to the company within 60 days. Failure to do so will forever bar you from obtaining relief for these unreimbursed pregnancy claims.

If you paid the extra $7 per month premium for pregnancy coverage you will be entitled to reimbursement for the premiums paid since April 29, 1979, as well as payment for unreimbursed hospital and medical costs related to your spouses pregnancy. Reimbursement will be made in accordance with the Comprehensive Major Medical Benefits Provisions in effect at the time the pregnancy related costs were incurred.

Sincerely,
Joe T. LaBoon
President

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PLAINTIFF-APPELLEE,

v.

ATLANTA GAS LIGHT COMPANY,
DEFENDANT-APPELLANT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION

No. C81-1090A.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

versus

ATLANTA GAS LIGHT COMPANY

ORDER

The above-styled action is brought under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*, alleging that the defendant has discriminated against its male employees on the basis of sex. The plaintiff contends that the defendant has violated Section 703(a) of Title VII, 42 U.S.C. § 2000e-2(a) by failing to provide coverage for the pregnancy-related medical expenses of the dependent spouses of its male employees to the extent that it provides comprehensive coverage for the medical expenses of the dependent spouses of its female employees. The defendant denies that its employee benefit plan violates Title VII.

The matter is presently before the court on the parties' cross-motions for summary judgment. As there are no disputed issues of material fact, resolution of the remaining legal issue by the court is appropriate. To date, two Circuit Courts of Appeal have addressed the merits of the identical issue in cases involving the Equal Employment Opportunity Commission and

other employers, and the most recent decision has found no Title VII violation. *EEOC v. Lockheed Missiles & Space Co.*, No. 81-4542, 29 FEP Cases 281 (9th Cir. July 6, 1982); *contra, Newport News Shipbuilding and Dry Dock Co. v. EEOC*, 667 F.2d 448 (4th Cir. June 22, 1982). After carefully considering the briefs of counsel and the relevant appellate decisions, the court has concluded that the Ninth Circuit's interpretation is the correct one. Accordingly, the plaintiff's motion for summary judgment is hereby overruled and denied, and the defendant's motion for summary judgment is hereby granted and sustained.

SO ORDERED, this 17 day of August, 1982.

/s/ G. ERNEST TIDWELL
Judge, United States District Court

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PLAINTIFF-APPELLEE,

v.

ATLANTA GAS LIGHT COMPANY,
DEFENDANT-APPELLANT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 84-8051.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff-Appellee,

versus

ATLANTA GAS LIGHT COMPANY,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Georgia

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion January 28, 1985, 11 Cir., 1985, ____F.2d____).
(June 3, 1985)

Before VANCE and ANDERSON, Circuit Judges, and PITTMAN,* District Judge.

PER CURIAM

(X) The Petition for Rehearing is DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court

*Honorable Virgil Pittman, U.S. District Judge for the Southern District of Alabama, sitting by designation.

be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ ROBERT S. VANCE
United States Circuit Judge